ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
ASSESSMENT AND COLLECTION OF REGULATORY FEES FOR FISCAL YEAR 1995	)	MD DOCKET NO. 95-3
	)	
	)	

COMMENTS OF RADIO 840, INC.

On the behalf of **Radio 840, Inc.** ("840"), we hereby respectfully submit the following Comments in response to the Federal Communications Commission's ("Commission") *Notice of Proposed Rule Making* (FCC 95-14) released January 12, 1995 in the above-captioned proceeding (*"NPRM"*).

I. *STATEMENT OF INTENT*

1. Radio 840, Inc. is the Licensee of Radio Station WCTG (AM), Columbia, South Carolina. Radio Station WCTG is a Class D AM facility operating at 50 kW, daytime power only. As an owner of a facility in an Arbitron Rated Market (Columbia, SC No. #91) (See *BROADCASTING & CABLE YEARBOOK 1994 p. B-598*), 840 will be directly affected by any rule or policy adopted by the Commission pursuant to this Rule Making Docket and therefore has standing to offer the following Comments.

II. *BACKGROUND*

2. The Commission has been authorized and directed by Congress to assess and collect annual regulatory fees to cover costs incurred by the Commission in carrying out its services to the public. See 47 *U.S.C.* 159 (a). Fees were first collected under this Authorization during the summer of 1994.

3. Today, under the Commission's 1995 Budget, there is proposed a significant increase (as much as 50% in some cases) in fees over 1994. The

Commission has also proposed a distinction in the amount of regulatory fees imposed for the different classes of radio an TV licenses. This distinction is between the 261 Arbitron markets ("MSA's") and non-Arbitron Markets. See *NPRM* at page 14. Under this new proposal, radio stations which fall within an Arbitron market will have to pay regulatory fee significantly greater than the same class of station located outside an Arbitron market.

4. As will be shown below, the proposed distinction between Arbitron and non-Arbitron markets proposed by the Commission is arbitrary and violates court precedent and the U.S. Constitution. Furthermore, the increase in fees for AM licensees is directly in contradiction to the Commission's policies to assist AM radio stations, specifically AM daytime facilities.

III. *ARGUMENT*

A. *Use of Arbitron Markets to Distinguish Between Regulatory Fees is Unconstitutional and in Violation of Court Precedent*

5. The use of Arbitron versus non-Arbitron markets as a distinction between regulatory fees for radio stations is arbitrary and unconstitutional. The Commission states in the *NPRM* that they "included a further distinction in order to recognize that population density of a station's geographic location was also a public interest factor warranting recognition in the fee schedule." See *NPRM* at p. 14. With this distinction in place, an AM Facility like WCTG in Columbia, South Carolina would be required to pay $425.00; however, a similar station just outside the Columbia MSA would be charged only $155.00. The sole distinguishing factor given by the Commission is each station's proximity to an Arbitron market. The Commission provided the public with *no facts* that indicate such a distinction is necessary to achieve a *compelling governmental interest.* The only governmental interest is for the collection of fees only, not in creating arbitrary classifications between like broadcast stations.

6. This class differentiation runs afoul of the *Equal Protection Clause* as set forth in the *U.S. Constitution*. When the federal government makes these types of classification which, had they been made by a state, would violate the *Fourteenth Amendment*, the U.S. Supreme Court has treated these types of violations as a violation of the *Fifth Amendment Due Process Clause*. See *Bolling v. Sharp*, 347 U.S. 497 (1954).

7. The Commission's differentiation also runs counter to the D.C. Circuit Court's ruling in *Melody Music, Inc. v. FCC*, 345 F2d 539, 4 RR 2d 2029 (D.C. Cir. 1965). In that case the U.S. Court of Appeals directed the Commission to treat like cases alike in the absence of an announced change in policy in a reasoned agency decision. Applying *Melody Music* and the *Equal Protection* to the case of the regulatory fee, we can find no valid reason to distinguish between like class stations in Arbitron and non-Arbitron markets.

8. The Commission's proposal shifts emphasis away from fees based on the cost of regulating a specific class of facility to one based on market size. Fees must be based on the cost of regulation, not on the arbitrary value placed on a market size. The use of Arbitron markets as a distinction between identical facilities must be reconsidered and rejected when determining the final regulatory fee framework.

B. *The Proposed Increase in Regulatory Fees For AM Stations Contravenes Existing Commission Policy.*

9. Over the past several years, the Commission has noted the decline in AM radio and has attempted through various policies such as Expanded Band, and a change in the multiple ownership rules, to give a boost to the struggling medium. Indeed, the Commission Staff has gone so far as to state that radio, particularly AM facilities were "in profound financial distress". See *Memorandum*

to the Chairman on Overview of Radio Industry by Roy Stewart dated January 29, 1992, ("*Stewart Memo*").

10. Considering the state of AM, the over fifty percent fee increase from one year to the next for stations like WCTG imposes a significant burden. As indicated in the *Stewart Memo* at page 2, fifty percent of all radio stations are very small businesses with fewer than ten employees. Any increase in unnecessary costs can and does have an adverse impact on these small broadcasters. The *NPRM*, as written, proposes to increase the fees by over fifty percent, with continued increases projected. This "small" fee can spiral into a large amount which could have devastating effects on the future of AM Radio.

IV. *PROPOSAL*

11. 840 believes that in order to be fair the regulatory fees must be applied at the same rate to all stations in the same class, with no distinction as to market size. For example, all Class A FM facilities should be at one rate, and so on. 840 also proposes that the Commission review these significant increases and reconsider fee increases for AM facilities as a type of facility. 840 recognizes that fee increases affect all broadcasters; however, considering past history of AM, any fee increase would affect struggling AM stations. Furthermore, assuming that the Commission has no discretion to eliminate regulatory fees altogether for AM radio, 840 believes the next best solution would be to maintain the regulatory fee system and rate as it was during 1994.

V. *CONCLUSION*

12. In conclusion, 840 objects to the use of Arbitron verses non-Arbitron markets as a basis for setting regulatory fees because such classification between identical facilities runs contrary to the *U.S. Constitution*, as applied through the *Fifth Amendment*, as well as case law. Furthermore, 840 objects to the significant

increase in fees, at a time when the Commission has recognized that many AM broadcasters are struggling.

13. Fairness dictates that regulatory fees be consistent in application from stations in Arbitron market one to those in non-rated markets. Moreover, 840 believes the best solution is to maintain the regulatory fee system and rates as 1994.

Respectfully submitted,

RADIO 840, INC.

By: _____

David M. Hunsaker
John C. Trent
Its Attorneys
February 13, 1995

Law Offices
PUTBRESE & HUNSAKER
6800 Fleetwood Road, Suite 100
P.O. Box 539
McLean Virginia 22101-0539
(703) 790-8400